UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: 05-CV-0329 GKF-SAJ
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

THE CARGILL DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION FOR CLARIFICATION/ RECONSIDERATION

Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") submit this reply in support of their Motion for Clarification/ Reconsideration of the Court's July 6, 2007 Order. In response to the Cargill Defendants' Motion, Plaintiffs try to convince the Court to adopt their overbroad construction of its July 6, 2007 Order by deflecting the Court from a central issue in this case: whether these Defendants or their contract growers caused detrimental environmental effects in the IRW by land-applying poultry litter containing phosphorus and other constituents. None of the discovery Plaintiffs now contend the July 6 Order requires is probative on any of the issues in this case, and such discovery would be unduly burdensome to obtain. The Cargill Defendants therefore urge the Court to grant their Motion and to limit Plaintiffs to the discovery of documents that relate to the allegedly detrimental environmental effects of land application of poultry litter (not mere constituents of poultry litter) in the United States.

I. The Cargill Defendants' Motion for Clarification/Reconsideration Is Properly Before the Court.

Plaintiffs incorrectly suggest that the Cargill Defendants brought their Motion simply because they did not like the Court's July 6 Order. To the contrary, the Cargill Defendants filed their Motion based on a genuine dispute arising in the course of the parties' conferrals about what the Court's July 6 Order requires of the Cargill Defendants. As explained in the underlying Motion, in their briefing leading to the July 6 Order, Plaintiffs represented to the Court that the Cargill Defendants would not have to search all their business units and facilities world wide because not all of their units and facilities had "a connection or relevance to the poultry industry and its environmental impacts." (Docket No. 1147 at 7.) Based on this representation, the Court allowed Plaintiffs to discover documents regarding corporate knowledge of the environmental effects of land application of poultry litter, but limited discovery on this issue to the Illinois River Watershed ("IRW"). (Docket No. 1207 at 3). The Court also noted that it could not determine the validity of the Plaintiffs' arguments regarding the temporal and geographic scope of other discovery without further briefing and (potentially) testimony on the issues. (Id.) The Court ordered the parties to meet and confer to resolve remaining issues relating to the pending motion to compel. (Id.) Given the Court's clear ruling that Plaintiffs' right to discovery of corporate knowledge is not unlimited, the Cargill Defendants now ask the Court clarify the limits of its July 6 Order, particularly in the face of Plaintiffs' recently disclosed opinion that the Order is not limited to poultry litter, and is not limited either to the United States or to the land application of poultry litter.

To the extent that the Cargill Defendants' Motion is treated as a Motion for Reconsideration, Plaintiffs err in arguing that the Cargill Defendants' Motion is untimely.

Neither Rule 59 nor Rule 72 required the Cargill Defendants to file a motion for reconsideration of the July 6 Order within 10 days. First, because the instant Motion addresses a discovery Order, Rule 59 does not apply. See Fed. R. Civ. Proc. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment."); Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods., Inc., 115 F. Supp. 2d 1250, 1255-56 (D. Colo. 2000) (noting that a court has "inherent power to alter or amend interlocutory orders" even where the "more stringent requirements applicable to a motion to alter or amend a final judgment under Rule 59(e) . . . . are not satisfied.")

Second, Rule 72(b)'s ten-day deadline for filing objections to a Magistrate Judge's nondispositive order has no bearing here. The Cargill Defendants are not asking the presiding Judge to review the Magistrate Judge's Order. The present dispute arose only after the Cargill Defendants and Plaintiffs met and conferred pursuant to the July 6 Order, and Plaintiffs asserted an extraordinary construction of that Order. In the briefing underlying the Order, Plaintiffs claimed that they sought only information connected or relevant to the poultry industry and its environmental impacts, and that the discovery sought would not require the Cargill Defendants to search all their business units and facilities for responsive information. (See Docket No. 1147 at 7.) Months later, Plaintiffs adopted a contrary interpretation of the Order that would require the Cargill Defendants to make just such an overly broad and burdensome search. The Plaintiffs' reversal of position compelled the Cargill Defendants to seek the instant relief from the Court.

Further, despite Plaintiffs' statements to the contrary, the Cargill Defendants have identified both new evidence and manifest injustice that would warrant the Court's reconsideration of the July 6 Order. See Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000); Langenfeld v. Bank of Am., No. 05-CV-619-TCK-FHM, 2007 WL 2034366, at

*3 (N.D. Okla. July 9, 2007). When the Order was issued, Plaintiffs' position regarding the scope of the Order was not clear. Also, at the time, the Cargill Defendants could not provide the Court with additional evidence regarding the potential burden of an international production of documents. Although the Cargill Defendants still cannot determine the size of this burden with certainty, they can now estimate what such a global search may require based on the considerable efforts already expended by the Cargill Defendants in producing corporate knowledge documents relating to the environmental effects of land application of poultry litter in the United States. As the Cargill Defendants explained in the opening brief, in light of the immense burden and little – if any – relevance to the issues in this case, producing the information Plaintiffs seek under their interpretation of the July 6 Order would result in manifest injustice to the Cargill Defendants.

II. The Burden on the Cargill Defendants Greatly Outweighs the Probative Value of the Information Sought by Plaintiffs.

Under a strained construction of the Court's July 6 Order, Plaintiffs seek information that is of such questionable value it may not even reach the low threshold of relevance under Rule 26. Even assuming marginal relevance, however, the information is of such weak probative value and would place such an undue burden that this Court should find it is not discoverable.

A. The Information Sought Is Not Relevant.

Where the relevancy of information is not readily apparent, as here, the party seeking the discovery has the burden to show the relevance of the discovery request. Steil v. Humana Kansas City, Inc., 197 F.R.D. 442, 445 (D. Kan. 2000). Thus, just as the Court is requiring Plaintiffs to demonstrate that the discovery of information more than five years old is appropriate (see Docket Nos. 1336 at 7; 1317 at 223-28), the Court should require Plaintiffs to demonstrate that the Cargill Defendants' corporate knowledge of detrimental environmental effects in

locations remote from the IRW, and in situations having nothing to do with the land application of poultry litter, is appropriate. Plaintiffs have failed to demonstrate the probative value of the information they seek. Plaintiffs assert that they seek information relating to constituents found in poultry litter, but in reality seek any information relating to any phosphorus, nitrogen, zinc, copper, or other compounds regardless of whether those compounds are actually found in poultry litter. Plaintiffs bear the initial burden of making some showing that, for example, the phosphorus compounds found at a phosphorus mine are the same compounds found in poultry litter, and that these compounds behave in a similar manner in the environment. Plaintiffs have failed to do so.

As it did with the temporal scope of Plaintiffs' discovery, the Court should critically examine whether the information Plaintiffs seek here—the corporate knowledge of information regarding the effects of any such compounds, anywhere in the world, at any time, in any context—is sufficiently relevant to warrant the greater burden discovery of such information would impose.

Plaintiffs have failed to meet their burden of demonstrating that any of the discovery they now contend the July 6 Order requires is even minimally relevant to the issues in this case. As this Court is aware, a central issue in this case is whether the Cargill Defendants or their contract growers caused detrimental environmental effects in the IRW by land applying poultry litter containing phosphorus and other constituents. Plaintiffs have admitted that they have no direct evidence of any kind supporting their theory of this issue, even in the IRW. (See, e.g., Docket No. 1272 at 5, 8-10.) Their attempt to search for information pertaining not only to the land application of poultry litter, but also to any detrimental effects from any compounds involving constituents that may be found in poultry litter from other corporate entities in other countries of

the world and in other contexts therefore amounts to no more than a fishing expedition. See Koch v. Koch Indus., Inc., 203 F.3d 1202, 1238 (10th Cir. 2000) (stating that the district court correctly recognized that the likely benefit of an "attempted fishing expedition was speculative at best" and that a plaintiff who pleads allegations without knowing of specific wrongdoing by the defendant and then submits "massive discovery requests . . . in the hope of finding particular evidence of wrongdoing . . . abuses the discovery process . . . ."); see also Martinez v. True, 128 Fed. Appx. 714, 716 (10th Cir. 2005) (noting that a party "may not use discovery as a fishing expedition.").

Plaintiffs first argue that discovery into the Cargill Defendants' entire corporate knowledge of environmental dangers of poultry waste is relevant. (Docket No. 1321 at 3-4.) However, Plaintiffs cannot justify their overbroad construction of the Court's July 6 Order under the guise of "corporate knowledge." The corporate knowledge which is relevant to the issues in this litigation is not the corporate knowledge of the Cargill Defendants as to the broad environmental effects of poultry litter constituents in remote areas of the world. Rather, it is the corporate knowledge of the Cargill Defendants of the environmental effects of poultry litter in the IRW itself. Plaintiffs plead their common law claims with language borrowed from the Restatement (Second) of Torts § 825 and comment c. (See, e.g., Docket Nos. 584 at 4 n.8; 910-2 at 15-16.) Even under the liberal intent standards of Restatement § 825(b), which Plaintiffs apparently believe is applicable to their common law claims, Plaintiffs must show that the Defendants had knowledge of the environmental effects of poultry litter in the IRW. See, e.g., Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748, 760 (S.D. 1996) (applying Restatement section). Knowledge of potential detrimental effects of a different phosphorus compound from a

different corporate entity in a different country is not probative of the Cargill Defendants' knowledge of the environmental effects of the land-application of poultry litter in the IRW.

Plaintiffs next contend that they are entitled to such broad discovery because "knowledge of, for example, the environmental effects of phosphorus on water quality, whether it comes from poultry operations or some other source, plainly has relevance to the poultry industry and its environmental impacts." (Docket No. 1321 at 5.) They also argue that they are entitled to broad discovery because the Cargill Defendants maintain one set of environmental expectations for all of their facilities.[1]

Both of Plaintiffs' arguments miss the point. The applicable "environmental expectations" here concern poultry litter management practices and industry standards in the IRW or, at most, the United States. (See id. at 4 n.3, 5 n.4.) The environmental effects of some form of a poultry litter constituent on water quality, in another area of the world, which has entered the environment in another manner, is not what is at issue in this case. There are vast differences between the kinds of facilities from which Plaintiffs seek information, including without limitation the climate, soil, human impacts, and other conditions in which these facilities operate. In addition, with respect to at least one of the constituents about which Plaintiffs seek information – phosphorus – Plaintiffs have already admitted that one of its forms (elemental phosphorus) cannot be found in poultry litter. (Docket No. 1317 at 174:14-15: "elemental phosphorus which is that rare, volatile, highly flammable substance which everyone knows is not found in poultry waste.") Thus, regardless of what expectations the Cargill Defendants maintain

[1] This statement appears in the context of Cargill's efforts to recycle solid waste at a citric acid plant in Brazil. The Cargill Defendants respectfully submit that such a statement from such a remote context cannot reasonably justify the limitless discovery Plaintiffs seek.

for their facilities or what standards they follow, Plaintiffs have not demonstrated that this information is relevant, or likely to lead to the discovery of information that is relevant, to the environmental impact of land-applied poultry litter in the IRW.

B. The Burden of Obtaining the Information Sought Outweighs Any Possible Probative Value.

The burden on the Cargill Defendants to obtain information that 1) has little or no probative connection to the ultimate issues in this case, 2) is located across the globe, and 3) is likely to be written in foreign languages, would be immense. Plaintiffs state that the Cargill Defendants do not have any evidence supporting their assertions of burden and expense. Yet as explained in the opening brief, the Cargill Defendants are unable to provide the Court with concrete numbers because they are still diligently compiling information responsive to Plaintiffs' discovery requests and the Court's July 6 Order from the Cargill Defendants' domestic facilities in the United States alone.

Nevertheless, based on the costs they have incurred relative to their United States facilities, the Cargill Defendants are able to provide the Court with a general understanding of the burden Plaintiffs' interpretation of the Court's July 6 Order would impose. In the months since the issuance of the Court's Order, the Cargill Defendants have collected approximately 223 boxes, or 669,000 pages,[2] in six states that may contain corporate knowledge information from their domestic turkey production facilities. (See Docket No. 1298, Ex. 2 ¶¶ 3, 5; Ex. 1 ¶ 3.) They have spent over 600 person-hours identifying locations of potentially responsive documents, interviewing records custodians, and physically retrieving these documents alone. (Ex. 1 ¶ 4.) The Cargill Defendants have spent many more person-hours conducting an on-going

[2] This total does not include electronically stored information which is also being collected and reviewed.

detailed review of the documents collected for actual responsiveness, confidentiality, and privilege, and they expect to begin producing responsive documents on a rolling basis by the first week of November. (Ex. 1 ¶ 5.) Unlike Plaintiffs, who have chosen to produce hundreds of boxes of documents containing large amounts of non-responsive material in an undifferentiated format to each and every Defendant (regardless of an individual Defendant's actual discovery requests), the Cargill Defendants will review all of the potentially responsive documents and cull out the irrelevant information.

These extraordinary efforts will increase exponentially if the Court accepts Plaintiffs' overbroad interpretation of the July 6 Order. With respect to chicken production facilities alone, the Cargill Defendants operate twelve complexes in five countries. (Docket No. 1298, Ex. 2 ¶ 11.) With respect to all types of facilities, they operate 90 business units in 66 countries. (Docket No. 1136, Ex. 2 ¶ 8.) Considering the amount of time and money the Cargill Defendants have spent obtaining information from their domestic turkey facilities, it would be extremely difficult for the Cargill Defendants even to identify all of the business units that might contain information about "phosphorous" and other constituents in <u>any context</u>, let alone search, review, and produce responsive documents within the time constraints of this litigation.

Plaintiffs' attempts to downplay the extent of this burden fall short. Plaintiffs first argue that they seek only information that has a connection or relevance to the poultry industry and its environmental impacts. Yet, as demonstrated above, Plaintiffs' interpretation of what information has a connection or relevance to the poultry industry is extremely expansive. Plaintiffs do not deny that their new interpretation of the July 6 Order would require the Cargill Defendants to produce information from all types of facilities, such as those producing soybeans,

food ingredients, and palm oil. Nor do they deny that under the Order they seek information about commercial fertilizer, a product entirely distinct from naturally occurring poultry litter.

Plaintiffs also argue that because we live in an era of "instantaneous…communications," searching for documents in foreign countries should not be difficult. (Docket No. 1321 at 6.) Plaintiffs' position is ironic and not credible: in this era of "instantaneous communications" Plaintiffs are still unable to complete their own document production in response to requests the Cargill Defendants served well over a year ago, and they are producing documents that are all located in the State of Oklahoma. Regardless, the availability of "instantaneous communications" in the United States and most developed nations does little to speed or ease the actual collection, review and production of documents from other parts of the world, written in a multitude of languages and stored in a multitude of hardcopy and electronic formats and locations. Plaintiffs cannot show that such a global review of 90 business units in 66 countries would yield information that, if relevant at all, is sufficiently probative to outweigh the mammoth production burden on the Cargill Defendants.

CONCLUSION

Plaintiffs' overbroad construction of the July 6 Order would impose on the Cargill Defendants burdens that are vastly disproportionate to the relevance of the information sought. The Cargill Defendants respectfully request that the Court clarify that its July 6 Order requires the Cargill Defendants to produce only documents that relate to the allegedly detrimental environmental effects of land application of poultry litter itself, not each of its individual constituents or components, within the United States. In the alternative, the Cargill Defendants respectfully request that the Court reconsider its Order and so hold.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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